

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

60128

FILE: B-184583

DATE: November 6, 1975

MATTER OF: Business Equipment Center, Ltd.

97710

DIGEST:

Where IFB for transcribing machines solicited brand name or equal product, award should not have been made to bidder whose product did not have automatic electronic indexing listed as salient characteristic in purchase description, since salient characteristics are regarded as material and essential to needs of Government; however, as equipment has been delivered, no corrective action is possible.

Business Equipment Center, Ltd. (BEC), has protested the contract that was awarded to Washington Office Products Company (Washington) on the basis that the product offered by Washington is not an "equal" to the brand name product referenced in invitation for bids (IFB) BATF-75-A-936 issued by the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury.

The "brand name or equal" purchase description in the IFB provided:

"Transcribing Machine with foot control earphone set and dust cover. Shall have speed control and automotive backspacing, fast erase during rewind, a three-digit automatic tape counter and fully-automatic electronic indexing, accept standard size cassette, roller controls and self-contained speaker for group listening as well as a standard earphone set for transcription. Cabinet to be wood-grain finish. Sony Secutive BM-25A Transcribing Machine with Sony Foot Control Unit FS-35, or equal."

BEC has contended that the product (Sanyo Electric Co., Ltd., model TRC 8000TA) offered by Washington is not in compliance with the purchase description in that it lacks (1) automatic electronic

indexing, (2) automatic backspacing, (3) wood-grain cabinet, and (4) roller controls. Also, BEC has contended that the offered footpedal is inferior to the brand name footpedal. The contracting agency agrees that the product does not have automatic electronic indexing, but disputes the contentions made about the other characteristics. It is unnecessary to resolve the latter aspect, since for the reasons indicated below we have determined that the WOP bid was otherwise nonresponsive.

Although the absence of automatic electronic indexing is conceded, the contracting agency states that the equipment contained a manual indexing system which the contracting officer considered to be functionally equal. In that respect, the agency stated that the IFB contained the clause required by section 1-1.307-6(a) of the Federal Procurement Regulations (FPR) (1964 ed. amend. 117), informing bidders that the "brand name or equal" description was intended to be descriptive, but not restrictive, and that bids offering "equal" products would be considered if it was determined that such products were equal in all material respects to the referenced brand name products. Further, reliance is placed upon the statement in FPR § 1-1.307-7 (1964 ed. amend. 117) that:

"* * * Bids shall not be rejected because of minor differences in design, construction, or features which do not affect the suitability of the products for their intended use."

The "brand name or equal" clause in the IFB is not in all respects the same as the clause prescribed in FPR § 1-1.307-6(a). The last sentence in paragraph (a) of the clause in the IFB states:

"* * * Bids offering 'equal' products will be considered for award if such products are clearly identified in the bids and are determined by the Government to be equal in all material respects to the brand name products referenced in the Invitation for Bids." (Emphasis supplied.)

However, the last sentence in paragraph (a) of the clause prescribed by FPR states:

"* * * Bids offering 'equal' products * * * will be considered for award if such products are clearly identified in the bids and are determined by the Government to meet fully the salient characteristics requirements listed in the invitation." (Emphasis supplied.)

Although we are recommending that the Secretary of the Treasury take steps to assure that the correct clauses prescribed by FPR are included in future IFB's of the contracting activity, the variance in languages in this case makes no difference. Where, as here, the contracting agency, in a "brand name or equal" purchase description, goes beyond the make and model of the brand name and specifies particular features, such features must be presumed to have been regarded as material and essential to the needs of the Government, at least at the time the specifications were drawn and bids solicited. 49 Comp. Gen. 195, 198 (1969), and S. Livingston & Son, Inc., B-183820, September 24, 1975. The latter decision involved a situation where the Smithsonian made an award to a bidder whose sample shirt deviated from the salient characteristics listed in the "brand name or equal" purchase description in the IFB. In considering the matter, we said:

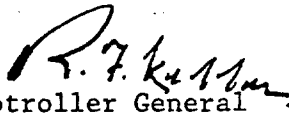
"Concerning Smithsonian's indication that the deviations contained in Setlow's sample were minor and did not affect the shirt's suitability, if this were the case, such features should not have been listed as salient characteristics of the brand name item in the specification. This action, we feel, may have misled other bidders into believing such features were mandatory and incorporated them in their samples with a resulting higher bid price. It may also have had the effect of causing some potential bidders not to submit bids, hence lessening competition. Therefore, based on the above, we believe the contract was improperly awarded to a bidder who was nonresponsive to the requirements contained in the IFB."

Further, we have held that an IFB which fails to list all the characteristics deemed essential or lists characteristics which

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are not essential is defective. 49 Comp. Gen. 347 (1969). Since the IFB listed an "automatic" electronic indexing system as a salient characteristic which after bid opening the procuring activity determined was not essential to its needs, the IFB should have been canceled as defective and a readvertisement made of the Government's actual requirements. B-173790, January 26, 1972.

For the above reasons, we agree with BEC that the contract should not have been awarded to Washington. However, the contracting officer has informally advised that all the transcribing machines have been delivered. Thus, meaningful corrective action for this procurement is not possible. Nevertheless, we are bringing this matter to the attention of the Secretary of the Treasury with the suggestion that steps be taken to prevent a recurrence of this situation in future procurements.


Acting Comptroller General
of the United States